SOOSAINATHAN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 41-184-2000]
13 MARCH 2001

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Whether sentence excessive - Previous convictions - Whether taken into account correctly - Plea of guilty as mitigating factor - Whether failure to consider guilty plea amounted to misdirection*

The accused was charged with being in possession of drugs and for failing to produce his identity card when requested to do so by a police officer. He pleaded guilty to both charges. The accused had three previous convictions.

In his plea of mitigation, the accused prayed to the court to consider his guilty plea in the sentence imposed. The court accepted the guilty plea and imposed a sentence of four years' imprisonment to be followed by a year's police supervision with regard to the first charge, and a fine of RM300 in default of three months' imprisonment with regard to the second charge. The accused appealed against the sentence imposed.

Held:

[1] The magistrate had erred in his treatment of the previous convictions of the accused in assessing sentence in several ways: (i) the sentence imposed was disproportionate to the gravity of the current offence, and amounted to a fresh penalty for the past convictions; (ii) the first two convictions had absolutely no similarity to the present offence as they were of a different nature; (iii) the magistrate's reference to the binding over order made in respect of the first conviction should not have been taken into account since that sentence was ordered 20 years ago; (iv) the sentence imposed for the third conviction in 1991 should not have been considered seriously in view of the time that had since lapsed.

[2] The application of the guilty plea in favour of an accused depends on the circumstances of each case. The magistrate had not considered the guilty plea in favour of the accused but failed to explain his reasons for doing so, which amounted to a misdirection.

[3] The accused had made an effort to rehabilitate himself since his third previous conviction. Therefore, the sentencing of the accused should have proceeded on the basis that he was a person of good character.

[4] In cases involving possession of drugs, the weight of the drugs plays a significant role in assessing sentence. The accused had in his possession only 0.07 grammes of monoacetylmorphine, which suggested that the drugs were for his own consumption.

[5] The most appropriate sentence to be imposed on the accused was a non-custodial one. Accordingly, the sentence in respect of the first charge was substituted with a fine of RM1,500 in default three months' imprisonment. The time spent in prison by the accused was to be used as a default sentence, if the accused chose so. The sentence passed in respect of the second charge shall remain.

[Appeal allowed.]

Case(s) referred to:
Cobiac v. Liddy [1969] 119 CLR 257 ***(refd)***
Director General of Public Prosecutions v. Ottewell [1970] AC 642 ***(refd)***
Kelly v. Russell [1969] 14 FLR 255 ***(refd)***
Lee Say & Ors v. PP [1985] 2 CLJ 155 ***(refd)***
Loh Hock Seng v. PP [1980] 2 MLJ 13 ***(refd)***
O'Donnell v. Perkins [1908] VLR 537 ***(refd)***
PP v. Dato' Nallakaruppan Solaimalai [1999] 2 CLJ 596 ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 MLJ 141 ***(refd)***
PP v. Jafa bin Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Low Kok Wai [1988] 3 MLJ 123 ***(refd)***
PP v. Oo Leng Swee & Ors [1981] 1 MLJ 247 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Sulaiman Ahmad [1993] 1 MLJ 74 ***(refd)***
PP v. Tia Ah Leng [2000] 5 CLJ 614 ***(refd)***
Pring v. Woolacot [1966] SASR 6 ***(refd)***
R v. Aroridge [1999] 2 Cr App R (S) 406 ***(refd)***
R v. Bishop [2000] Crim LR 60 ***(refd)***
R v. Boyd [1975] VR 168 ***(refd)***
R v. Fearon [1996] 2 Cr App R (S) 25 ***(refd)***
R v. Leo De Cruz [1935] MLJ 1 ***(refd)***
R v. Piercey [1971] VR 647 ***(refd)***
R v. Teo Cheng Lian [1949] MLJ 170 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Sim Gek Yong v. PP [1995] 1 SLR 537 ***(refd)***

Tan Lay Chen v. PP [2000] 4 CLJ 492 ***(refd)***
Vaughan v. Lennie [1981] VR 229 ***(refd)***
Veen v. R (No 2) [1988] 164 CLR 465 ***(refd)***
Wong Kai Chuen Philip v. PP [1991] 1 MLJ 321 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Dangerous Drugs Act 1952, s. 12(2), (3)
National Registration Regulations 1990, reg. 25(1)(n)
Penal Code, ss. 75, 392, 397
Subordinate Courts Act 1948, s. 87(2)

Other source(s) referred to:
Principles of Sentencing, DA Thomas, pp 174, 179
Sentencing: State and Federal Law in Victoria, Fox and Freiberg, 2nd edn, pp 269, 270, 271, 272

For the appellant - In person
For the prosecution - Azhar Abdul Hamid; DPP

Reported by Suresh Nathan

JUDGMENT

Augustine Paul J:

In this case two charges were preferred against the accused in the magistrate court at Kuala Lumpur. The first charge was for possession of 0.07 grammes of Monoacetylmorphine an offence under s. 12(2) of the Dangerous Drugs Act 1952 and punishable under s. 12(3) of the same Act. The second charge was for failure to produce his identity card when requested to do so by a police officer an offence under reg. 25(1)(n) of the National Registration Regulations 1990 and punishable under the same regulation. He pleaded guilty to both the charges. The pleas were accepted by the court. The accused had three previous convictions. The first conviction was on 17 June 1980 for possession of an offensive weapon under s. 6(1) of Ordinance No. 48/1952 for which he was bound over under s. 294 of the Criminal Procedure Code in the sum of RM500 with one surety. The second conviction was on 12 February 1988 for armed robbery under s. 392 read with s. 397 of the Penal Code for which he was sentenced to 24 months' imprisonment and ordered to be given two strokes of the rotan. The third conviction was on 12 February 1991 for possession of heroin under s. 12(2) of the Dangerous Drugs Act 1952 for which he was sentenced to 24 months' imprisonment to be followed by one year's police

supervision. In his plea in mitigation the accused prayed to the court to consider his guilty plea in the sentence to be imposed. He also said that he works as a sweeper with the City Hall, Kuala Lumpur. He earns RM850 per month out of which he gives RM400 to his family of a wife and a child aged 13. The learned magistrate imposed a sentence of four years' imprisonment to be followed by a year's police supervision with regard to the first charge and a fine of RM300 in default three months' imprisonment with regard to the second charge. This appeal is by the accused against the sentence imposed.

In his grounds of judgment the learned magistrate advanced three reasons in support of the sentences that he had imposed. They are as follows:

1. Rekod Kesalahan Lalu OKT

   Beliau mempunyai 3 rekod lalu dan nampaknya OKT masih tidak insaf lagi dengan terus melakukan kesalahan. Memandangkan hukuman yang lepas adalah penjara 24 bulan, kali ini Mahkamah berpendapat hukuman yang perlu dijatuhkan adalah patut lebih berat memandangkan masih tiada keinsafan.

2. OKT adalah pesalah ulangan

   Ini adalah kesalahan kali kedua melibatkan dadah dan di atas sebab itu hukuman yang akan dijatuhkan perlulah berbentuk pengajaran kepada OKT.

3. OKT pernah diberi peluang dahulu

   Pada kali pertama OKT melakukan kesalahan, OKT telah dilepaskan dengan ikat jamin untuk berkelakuan baik. Walaubagaimanapun OKT telah mensia-siakan peluang untuk mengubah jalan hidup dan masih memilih langkah lama.

   Hukuman yang dijatuhkan perlu memberi pengajaran kepada OKT.

   Dengan sebab-sebab yang telah diberikan, Mahkamah berpendapat hukuman adalah wajar dan munasabah.

In the hearing before me the accused, who was unrepresented, prayed for a lenient sentence. The learned deputy public prosecutor argued that the previous convictions of the accused should be weighed against the accused.

The principles governing the outcome of an appeal against sentence are well entrenched. In *R v. Leo De Cruz* [1935] MLJ 1 Huggard CJ said at the same page:

> In regard to appeals against sentence it has been laid down that the Court will not interfere with the sentence, unless the Judge has proceeded on wrong principles or given undue weight to some of the evidence.

Gordon-Smith J said in *R v. Teo Cheng Lian* [1949] MLJ 170 at p. 171:

> There must be a manifest error either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher Court interferes with the discretion undoubtedly vested in the lower Court.

As Hashim Yeop Sani J (as he then was) said in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257:

> The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

The material parts of the grounds of judgment of the learned magistrate that I have reproduced show that he was greatly influenced by the previous convictions of the accused. He felt that a heavier sentence must be imposed for the current offence as the accused has not repented since the imposition of 24 months' imprisonment in respect of the last conviction; that the sentence to be imposed must be a lesson to the accused as it is his second drug offence and that he has not made use of the binding over order made in respect of his first conviction. This requires a consideration of the manner in which the previous convictions of a person must be dealt with in assessing sentence.

Previous convictions are relevant in two ways. Firstly, they defeat any claim or inference that the accused is a first offender, or is of prior good character, for the purpose of any general plea in mitigation (see *Cobiac v. Liddy* [1969] 119 CLR 257). Secondly, they may satisfy the statutory requirement of a relevant previous conviction for the purpose of subjecting the accused to increased penalties allocated for second or subsequent offences (see *Vaughan v. Lennie* [1981] VR 229; *Pring v. Woolacot* [1966] SASR 6; *Kelly v. Russell* [1969] 14 FLR 255). Such statutory sanctions for an increased penalty is illustrated, for example, by s. 75 of the Penal Code and s. 87(2) of the Subordinate Courts Act 1948 which I have discussed in *PP v. Govindnan Chinden Nair* [1998] 2 MLJ 141. In the absence of statutory directions to the contrary there is no principle of sentencing that demands increasingly more severe sanctions to be administered to persons who persist in their criminality (see *Sentencing: State and Federal Law in Victoria* by Fox and Freiberg, 2nd edn, p. 269). A person who serves a sentence for a crime is regarded as having

paid the penalty in full and as one who ought not suffer again for the offence by having a sentence for a later crime increased because of the earlier offence (see *O'Donnell v. Perkins* [1908] VLR 537). The fact that a man with previous convictions receives a longer sentence than a first offender, and that a man with five previous convictions receives a longer sentence than a man with two previous convictions, is the result not of a progressive aggravation of the basic penalty, but a progressive loss of credit for good character until the offender's record is so bad that nothing could be urged in his favour in that regard. The importance of formulating the principle in this way is twofold – first, the court clearly considers that for any given offence there is an absolute maximum sentence, however bad the offender's record may be, and secondly, where the court wishes to place particular emphasis on deterrence and accordingly disregards mitigating factors, the first offender and the multiple recidivist are treated alike (see *Principles of Sentencing* by DA Thomas p. 174). However, because an accused's character is always in issue at sentencing, prior criminality can be referred to in the assessment of his general character to demonstrate that the current offence is no passing lapse, but evidence of a real unwillingness or incapacity to comply with the law. In further elaboration Fox and Freiberg say at pp. 270-271:

> Failure to respond to unsupervised and supervised release, to fines, or to short custodial sentences, allows a court to conclude that the offender's prospects for rehabilitation are poor and that the deterrent effect of more moderate sanctions is negligible. The offender's record is used as a predictor of how the person will react to similar sentences in the future. Past failures lead inexorably to more severe penalties, not for the purpose of renewing the earlier punishment, but as a further step in the search for a measure that will have some effect in bringing about law abiding behaviour. While there may be no legal presumption that a first offender is capable of reformation, an offender who has been given a number of opportunities to reform and who has failed to do so is unlikely to be given the benefit of the doubt. A long record of priors may indicate that claimed remorse on a plea of guilty may not be genuine, and that the present offence was not a momentary aberration, but represented a course of conduct that was consistent with the offender's character or general attitude. As the High Court has explained (*Veen v. R (No 2)* [1988] 164 CLR 465, 477):
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> > The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the

> antecedent criminal history when it illuminates the moral culpability of the offender in the instance case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.

In *Kane*, an extensive record going back over seven years was said to show a 'lawless character'; in *Wyatt*, numerous convictions for a wide range of offences revealed the offender as having an 'utter contempt for the law'; and in *Hillsley*, persistent prior sexual offending was regarded as a manifestation of a continuing attitude of disobedience to the law.

Thus the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the current offence. To do so would be to impose a fresh penalty for past offences (see *Director General of Public Prosecutions v. Ottewell* [1970] AC 642; *Veen v. R (No 2)* [1988] 164 CLR 465).

It must be observed that it is not every previous conviction that is considered relevant in the sentencing process. Previous offences that are significantly different from the current offence, or are regarded as uncharacteristic of the accused, may be given little or no weight (see *R v. Piercey* [1971] VR 647; *PP v. Jafa Daud* [1981] 1 MLJ 315) unless, overall, the disparate offences reveal a profound contempt for the law and a deliberate desire to enrich oneself by deliberately embarking on a course of criminality (see Fox and Freiberg at p. 272). Similarly, a gap between a previous conviction and the current offence will be viewed at less seriously. I had the occasion to consider this issue in some detail in *Zaidon Shariff v. PP* [1996] 4 CLJ 441 at pp. 447 – 448:

> In any event the fact that there has been a ten-year gap in the appellant's criminal record has not been duly appreciated by the learned Magistrate. The appellant's clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour. In this regard, DA Thomas in his book entitled *Principles of Sentencing* said, at p. 179:
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> > The fact that an offender who has a criminal record has made an effort to 'go straight' since his last conviction or release from prison normally counts as a substantial mitigating factor if he subsequently commits an offence. In the case where the previous offences were trivial and committed in the long distant past, the Court will normally disregard them entirely and treat the offender as a man of previous good character.

> Where the previous convictions are more numerous or are for offences of a more serious character, the existence of a good period free from conviction immediately before the commission of the present offence still has substantial mitigating effect. Clearly, the longer the period, the more effect it will have in mitigation, but while in some of the cases illustrating this point the period may be as long as twelve years, the Court will normally give credit for much shorter periods. In *Rosa*, a man of 41 sentenced to four years for housebreaking had ten previous convictions for dishonesty and violence, and had on one occasion been sentenced to seven years' imprisonment for wounding with intent. After his release from this sentence he had married, and in the following four years had been convicted only once in respect of a minor offence for which he was fined, and achieved a work record which was 'distinctly to his credit'. In view of the appellant's effort to reform, the sentence was reduced to two years' imprisonment.

> The gap principle has received judicial recognition in a plethora of cases. See, for example, *R v. Nutall* [1908] 1 Cr App Rep 180 and *R v. Bibbings* [1918] 13 Cr App Rep 205. In *R v. Goodwin and Wilkinson* [1910] 12 Cr App Rep 85 it was held that a period of honest work between the termination of a sentence and subsequent conviction ought to be taken into account in passing sentence for the latter. In *R v. Gunthrip* [1925] 19 Cr App Rep 45 the sentence was mitigated in view of the gap of three years' crime-free life between the two convictions.

The longer the gap between a previous conviction and the current offence the greater the mitigatory effect (see *R v. Piercey* [1971] VR 647). In *R v. Boyd* [1975] VR 168 a 12-year gap free of "violent crime" was considered "equivalent to good behaviour". In my opinion the determinative factor in treating a person with previous convictions as a man of previous good character is not so much the time that has lapsed since the last conviction but the positive steps that he has taken to rehabilitate himself. This is in line with the underlying principle in the assessment of the appropriate sentence which is to strike a balance between public interest and the interest of the accused.

The learned magistrate has erred in his treatment of the previous convictions of the accused in assessing sentence in a number of ways. His view that a heavier sentence must be imposed as the accused has not repented since the imposition of 24 months' imprisonment in respect of the last conviction has resulted in a sentence which is disproportionate to the gravity of the current offence. This amounts to the imposition of a fresh penalty for past offences. Furthermore, the first two convictions have absolutely no similarity with the present offence as they are of a different nature. It follows that the learned

magistrate's reference to the binding over order made in respect of the first conviction cannot be sustained. In any event that sentence was ordered 20 years ago and ought not to have been taken into account at all. The learned magistrate also ought not to have considered the sentence imposed in 1991 seriously in view of the time that has since lapsed.

In his plea in mitigation the accused had also prayed to the court to consider his guilty plea. As I said in *Zaidon Shariff v. PP* [1996] 4 CLJ 441 at p. 448:

> A mitigation plea should not be treated as a ritualistic step to be summarily rejected the moment it is made. It is a constituent element of the sentencing process. It merits due consideration in the light of the facts of each case, and more so when it is not contradicted by the prosecution as in this case. In this regard useful reference may be made to *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 70 where Hashim Yeop Sani J (as he then was) said at the same page:
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> > No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v. PP* [1975] 2 MLJ 134; *PP v. Sulaiman Ahmad* [1993] 1 MLJ 74; *PP v. Ravindran & Ors* [1993] 1 MLJ 45). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441; *Lee Say & Ors v. PP* [1985] 2 CLJ 155). Its application in favour of the accused depends on the circumstances of each case (see *Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321). The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng v. PP* [1980] 2 MLJ 13; *PP v. Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must give way (see *Sim Gek Yong v. PP* [1995] 1 SLR 537; *PP v. Govindnan Chinden Nair* [1998] 2 MLJ 181). A guilty plea cannot also be a powerful mitigating factor when effectively no defence to the charge is available to the accused (see *PP v. Low Kok Wai* [1988] 3 MLJ 123). If a plea of guilty is made too late in the trial it may also cease to have any mitigating effect (see *PP v. Dato' Nallakaruppan Solaimalai* [1999] 2 CLJ 596). The absence of mitigating factors in favour of the accused like, for instance, the existence of previous

convictions may also deprive the guilty plea of its effect. Thus, there can be no automatic rule that a guilty plea on its own entitles an accused person to a lesser punishment (see *PP v. Tia Ah Leng* [2000] 5 CLJ 614). Be that as it may, as I said in *Tan Lay Chen v. PP* [2000] 4 CLJ 492 at p. 497:

> ... it must not be overlooked that the general rule is that an accused should be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentencer. This is because an accused person expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of the case, be considered as a mitigating factor.

It has been held that a failure by the sentencing judge to refer to a guilty plea may result in the appellate court interfering in the sentence (see *R v. Bishop* [2000] Crim LR 60; *R v. Fearon* [1996] 2 Cr App R (S) 25; *R v. Aroridge* [1999] 2 Cr App R (S) 406). The learned magistrate has made no reference whatsoever in his grounds of judgment to the guilty plea of the accused with the result that there is no indication of the consideration given to the plea. Quite obviously he has not considered it in favour of the accused but he has failed to explain his reasons for not doing so. This amounts to a misdirection.

As the sentence imposed by the learned magistrate is anchored on wrong principles it warrants interference. With regard to the antecedent criminal history of the accused the first two convictions cannot be held against him as they occurred more than 12 years ago. Similarly the third previous conviction also cannot be said to blemish the character of the accused as he has made an effort to rehabilitate himself since his release from prison about seven years ago. At the time of the current offence he was gainfully employed as a sweeper and was contributing about RM400 p.m. towards his family expenditure. The sentencing of the accused must therefore proceed on the basis that he is a person of previous good character. It has been repeatedly stressed that in cases involving possession of drugs the weight of the drugs found on a person plays a significant role in assessing sentence (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441). In this case the accused had in his possession only 0.07 grammes of Monoacetylmorphine. This suggests that he was in possession of the drugs for his own consumption. This is yet another factor to be considered in the assessment of sentences in drug offences (see *PP v. Tia Ah Leng* [2000] 5 CLJ 614). The mitigatory effect of the guilty plea of the

accused thus remains unaffected. In the circumstances I am of the view that the most appropriate sentence to be imposed on the accused is a non-custodial one. Accordingly I substitute the sentence in respect of the first charge to a fine of RM1,500 in default three months' imprisonment. The time spent in prison by the accused is to be used as the default sentence, if the accused chooses. The sentence passed in respect of the second charge shall remain.